

(1985) 05 DEL CK 0009
In the Delhi High Court

P. Moidu Haji and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-05-1985

Acts Referred:

Citation : (1985) CriLJ 1430

Hon'ble Judges : N.N. Goswamy, J;Charanjit Talwar, J

Bench : Division Bench

Judgement

Charanjit Talwar, J.—This judgment disposes of Criminal Writ Petitions Nos. 63 of 1985, 64 of 1985 and 65 of 1985. The common question which arises for consideration (in) each of the petitions is : Whether the petitioner was prevented from making an effective representation against the impugned detention order and thus the protection of fundamental rights guaranteed under Articles 21 and 22(5) of the Constitution was denied to him. The main plea is that in the grounds of detention, documents which have been relied upon by the detaining authority in each of the three cases not having been supplied to the detenus even on a specific request for supply of the same, they were not afforded the right of making the representations against the detention orders as envisaged in Article 22(5) of the Constitution and hence their continued detention, is vitiated.

2. To appreciate the rival contentions it is necessary to notice a few facts. In Criminal Writ No. 63 of 1985 the detenu P. Saidalavi Haji, who is presently lodged in Central Prison, Trivendrum, Kerala, was detained under an order of detention passed on January 25, 1985 by Shri K. K. Dwivedi, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue in exercise of powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA Act) with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange. The grounds of detention also dated Jan. 25, 1985 were served on Feb. 13, 1985 a day after his arrest. Ground No. 13 refers to the search, which was conducted during the course of

investigation, of the premises belonging to one P. K. Khalid Haji. As a result of the search 13 sheets were seized. The case is that only copies of two sheets out of 13 sheets seized were supplied to the detenu along with the grounds of detention. In spite of a request "for supply of documents including the remainder of it sheets, those were not supplied as according to the detaining authority those have not been relied upon. At this stage it is useful to quote relevant portions of ground No. 13 of the grounds of detention to highlight the fact that those 13 documents have been at least referred to by the detaining authority:

As a result, 13 sheets were seized. At the time of the search P. K. Khalid Haji was not present and was reported to be out of India. The seized 13 sheets contain two letters both written by one Mohamed Kutty from Abu Dhabi to Khalid Haji on 19-1-1984. Out of these two letters one is marked page 6 which is the latest out of those two letters and in the said letter Khalid Haji while in India was directed to collect a sum of Rs. 48,000/- sent by the said Mohamed Kutty of Abu Dhabi and that the aforesaid amount of Rs. 48,000/- stands denoted in a code "48 Para " and that the code para has been admitted by you for being used as a code word. In the said letter Khalid was also informed to contact you for collecting the aforesaid amount. Since Khalid is out of India he could not be interrogated in the matter.

3. In his representation dated Feb. 22, 1985 the detenu stated that basic documents were not among the papers supplied to him and, Therefore, the order of detention was illegal as he had been prevented from making an effective representation. It was submitted that he, Therefore, be released. He further pleaded that "In case I cannot be released for reasons known to you only, I may be given the following basic documents mentioned in the grounds of detention immediately to enable me to make an effective representation against my illegal detention." Thereafter he enumerated various documents given in sub-paras (1) to (8) of his representation. The first item relates to the eleven documents which were stated to have been seized from the house of Khalid Haji on Sept. 26, 1984. It may be noted here that in the list of documents relied upon items 19 and 20 relate to the said search of Sept. 26, 1984. Those items read as follows:

19. Panchnama dated 26-9-84 regarding search of residence of P. K. Khalid Haji.

20. Copies of relevant seized documents.

It is not necessary to notice the details of the other documents which have been either relied upon or mentioned in the grounds of detention and copies of which were the non-supply of the eleven sheets which were seized from the house of Khalid Haji has prevented the petitioner from making an effective representation. Admittedly, the respondents did not accede to the request of the petitioner. Although 13 sheets were seized from the residence of P. K. Khalid Haji on Sept. 26, 1984, yet only copies of two of those sheets were supplied along with the grounds of detention. His request for copies of the remaining pages was turned down vide memorandum dated March 8, 1985. Para 2 of that Memorandum

reads as under:

Request for supply of certain documents have also been considered by the detaining authority. All the documents relied upon have already been supplied to the detenu along with the grounds of detention. The documents mentioned in the detenu's letter have not been relied upon and hence the request for supply of these documents has also been rejected by the detaining authority.

4. The plea regarding non-supply of documents has been raised in the petition in its ground No. 7. It is averred:

The detaining authority has failed to furnish to the detenu together with the grounds of detention copies of all the documents which have been set out in para 5 supra. These documents are referred to in the grounds of detention but they have not been supplied to the petitioner. Detenu had also requested for the supply of these documents but the same having not been supplied in spite of the requests the detenu has been deprived of making an effective representation. These documents were very relevant and material for making an effective representation and the detenu could have proved his innocence from the said documents.

5. We find that in fact in para 7 of the petition the detenu has set out the documents copies of which he had sought vide his representation dated Feb. 20, 1985. The reference in the above ground to para 5 seems to be a typographical error. In reply to this para Shri K. K. Dwivedi, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue in his counter-affidavit has inter alias submitted:

It is stated that the detaining authority has supplied to the detenu the copies of the documents which were relied upon by me while passing the detention order. It is specifically denied that the documents mentioned by the detenu in para 5 supra (in fact the detenu has mentioned those documents in para 7 supra) have been relied upon by the detaining authority. It is stated that copies of the documents relied upon by the detaining authority have been supplied to the detenu the list of which is mentioned along with the grounds of detention. It is further specifically denied that the documents asked for by the detenu are very relevant and material for making effective representation and the detenu could have proved his innocence from the said documents.

6. The position which emerges is that the detaining authority did not consider it proper to supply to the detenu copies of the documents which he had sought as, according to it, those documents have not been relied upon by it and further those were not considered relevant for making an effective representation by the detenu against his detention.

7. It is well settled now that failure to furnish copies of documents to the detenu on which reliance has been placed by the detaining authority vitiates the detention. This Court in a number of cases has further held that the copies of

documents which have been referred in the grounds of detention but not relied upon by the detaining authority have to be supplied to the detenu if he seeks copies of the same. On such a request being made by the detenu, it is not for the detaining authority to conclude that the copies of documents sought for were not relevant even for the defense of the detenu. It is for the detenu to consider as to how he can show his innocence from those documents. Mr. Harjinder Singh's reliance on Vinod Kumar Arora @ Vinod Kumar Vs. Administrator, Union Territory of Delhi and Others, and on Y. Kumar Vs. Union of India and Others, is well placed. This very view has been taken by another Division Bench in Gobind Ram v. Union of India Cri. Writ No. 128 of 1984 decided on January 7, 1985 reported in (1985) 1 Cri 776 .

8. In Criminal Writ Petition No. 64 of 1985 the case of the detenu, K. Veerankutty, is identical. He has been detained under order passed on Jan. 25, 1985 with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange. This order was also passed by Shri K. K. Dwivedi, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, who has been specially empowered u/s 3(1) of the COFEPOSA Act. He also sought copies of 11 documents out of 13 seized from the house of Shri Khalid Haji on Sept. 26, 1984. The seizure of these documents finds reference in ground No. 10 of the grounds of detention. In this case also the grounds of detention were passed on Jan. 25, 1985, In the list of "documents relied upon" which was supplied to the detenu the Panchnama regarding search of premises of P. K. Khalid Haji is mentioned at item No. 10 and the "Copies of relevant seized documents" is mentioned at item No. 11. In his representation dated Feb. 12, 7, 1985. He requested for supply of 11 (eleven) documents stated to have been seized from the house of Shri Khalid Haji on 26-9-1984." The averment regarding non-supply of documents in the writ petition as well as the stand of the respondents regarding those documents is similar to that of the petitioner in the first writ petition (Cri. W. No. 63 of 1985).

9. In Cri, Writ No. 65 of 1985 the detenu is A. M. Abdul Raheem. In this case the detention order dated Jan. 5, 1985 has been passed by the Government of Kerala in exercise of powers conferred upon it by Section 3(1)(ii), 3(i)(iii) and 3(1)(iv) of the COFEPOSA Act with a view to preventing him from transporting, keeping and dealing in smuggled goods. The grounds of detention also dated Jan. 5, 1985, were served on the detenu on Jan. 10, 1985. It is stated in ground No. IV that on search of the house of the detenu on Sept. 15, 1984 one of his personal diaries was recovered which was seized in presence of independent witness. The seizure memo was also signed by the detenu. It is alleged in that ground : "A copy of the mahazar was given to you and you had signed the original acknowledging the receipt." Thereafter in sub-para (b) it is stated.

Pages 9,10 and 11 of the diary seized from your house contains names and address of certain persons at various places.

10. Item 12 of the list of documents relied upon and annexed with the grounds

of detention refers to the search memo. It reads:

Mahazar dated 15-9-1984 relating to the search of residence of A. M. Abdul Raheem and copy of the ,pages 9, 10 and 11 of the diary.

11. The petitioner's case is that the whole diary which was recovered and seized from his residence has been relied upon by the detaining authority while passing the detention order. At any rate, it is submitted that vide representation (Copy annexure "C" to the writ petition) made to the Government of Kerala through his counsel he had sought copies of all the documents including the other pages of the diary on which reliance has been placed by the detaining authority. In para 6 of that representation he has given a list of documents which, according to him, ought to have been supplied along with the grounds of detention. In para 10 it has been submitted inter alia:

In case your honour is not prepared to revoke the said detention order, as my client has not been given an opportunity to make an effective representation, he would like to have copies of all the documents immediately so that he could make an effective representation. This request may kindly be treated as urgent. I humbly request that all the documents be supplied within 10 days of the receipt of this letter.

12. This request of the detenu was turned down by the Government of Kerala vide its letter dated Feb. 28, 1985 (copy Annexure "D"). From this letter it appears that the representation made by the detenu was dated Feb. 16, 1985. It is useful to quote para 2 of that letter as it has a bearing on the decision of this case:

I am also to inform that all the documents relied upon by the detaining authority have been served on your client on 10-1-85 along with the grounds for detention.

13. In para 6 of the writ petition the detenu has averred that documents mentioned at items (a) to (i) which have been relied upon in the grounds of detention were not supplied to him. One of the documents mentioned is:

(j) Copy of the full diary seized from A. M. Abdul Raheem's residence searched on 15-9-1984. But only given pages 9,10 and 11. Other pages not given.

14. The counter-affidavit filed on behalf of the Government of Kerala has been signed by Shri N. J. Thomas, a Section Officer in its Home Department. The deponent has averred that he is duly authorised to swear the affidavit. He has not, however, stated whether he ever dealt with the case of the detenu's detention or with his representation. In reply to para 6 of the writ petition, apart from reaffirming the stand taken in the Office Order dated Feb. 28, 1985 whereby request of the detenu for supply of documents was rejected, it is submitted:

The contention that the documents from (a) to (i) were not supplied to the detenu does not hold any merit considering the fact that these documents are

either non-existent or not relied upon for the detention of the detenu or already supplied to the detenu along with the grounds of detention.

15. We do not consider that it is necessary in the facts and circumstances of the case as brought out in the pleadings of the parties and from the documents which are on record to decide that all the documents mentioned in (a) to (i) of para 6 were actually relied upon by the detaining authority. However, it has to be held that all the pages of the diary have been referred to in the grounds of detention. In our view non-supply of copies of all the pages of diary sought for vide his representation dated Feb. 16, 1985 has resulted in depriving the detenu from making an effective representation. The averments in para 6 of the counter-affidavit in reply to para 6 of the writ petition, in our view, are only vague but misconceived (sic). It is not stated which of, the documents, copies of which were sought for, were "non-existent" and which of them out of documents (a) to (i) were not "relied upon". It further appears that the deponent was not at all advised about the law on the question raised by the detenu in the petition as also in his said representation.

16. Another plea of Mr. Harjinder Singh was that the detenu's representation through his brother to the President of India on Feb. 10, 1985 was mandatorily to be dealt with by the Government of India. Instead it was considered by the State Government and dismissed. It is, however, admitted that his earlier representation dated February 5, 1985 made to the Government of India had been rejected by that Government vide Memorandum dated Feb. 15, 1985 (copy Annexure F). In our opinion this argument has no force. In view of the fact that the Central Government has already considered and took a decision on the earlier representation, it was not obliged to consider the second representation, made to the President of India. See *State of Uttar Pradesh Vs. Zavad Zama Khan*, .

17. In this case while the petitioner was confined in jail he was served with an order dated Feb. 6, 1985 being declaration u/s 9 of the COFEPOSA Act passed by Shri T. S. Swaminathan, Additional Secretary to the Government of Kerala. This order was passed as the petitioner was likely to engage in transporting and keeping smuggled goods in areas which are highly vulnerable to smuggling. In the view which we are taking this order dated Feb. 6, 1985 (copy annexure "G") is also liable to be set aside.

18. Result of the above discussion is that the petitioners in all these three cases have been deprived from making effective representations. Their fundamental rights as envisaged under Article 22(5) of the Constitution of India were infringed. Therefore, we hold that their continued detention as per the impugned detention orders is illegal. The detention orders are consequently quashed. The declaration u/s 9 of the Act impugned in Crl. W. No. 65 of 1985 is also quashed. The rule in these three writ petitions is made absolute and the petitions are allowed. We direct that the petitioners in these three cases be set at liberty forthwith unless required to be detained under any other valid order passed by a

court or any other competent authority.